Appeal from the United States District Court
for the Middle District of Florida.

Before HILL, Circuit Judge, SMITH**, Judge, and HENDERSON, Circuit Judge.

SMITH, Judge:

Appellant, Mandalay Shores Cooperative Housing Association, Inc. (cooperative), appeals a judgment of the United States District Court for the Middle District of Florida, denying appellant's motion for a preliminary injunction and granting appellee's motion for summary judgment in favor of appellees, Samuel R. Pierce, Jr., et al., Department of Housing and Urban Development (hereafter HUD). Appellant requests (1) that HUD be enjoined from selling Mandalay Shores Apartments of Clearwater, Florida (the project) until the present litigation is finally completed and (2) that the case be remanded to the district court in order that material issues of fact present may be litigated. The project is one to which HUD acquired fee simple title in 1977 after the second of two defaults on the mortgage. The cooperative is a nonprofit corporation formed by a number of the tenants of the apartments, for the purpose of negotiating a purchase of the project. In its memorandum opinion the district court held that HUD, acting through its Property Disposition Committee, did not exercise discretion in an arbitrary and capricious manner in rejecting appellant's offer of purchase. We denied the motion for injunction in July 1981 and, after hearing oral arguments, we denied appellant's request that we stay HUD's opening of competitive bids on the project and subsequently, that a closing of sale scheduled for December 16, 1981, be stayed, *pendente lite*. After giving full consideration to the parties' arguments, briefs and other submissions, and the record, we affirm the decision of the district court as contained in its memorandum opinion dated April 2, 1981.

** Honorable Edward S. Smith, Judge for the U.S. Court of Claims, sitting by designation.

Appellant claims that the district court made a number of errors; however, since we affirm the lower court's decision and analysis of the issues it discussed we note briefly only those issues which the lower court did not directly address.

[1] First, appellant claims that a provision in leases which its members entered into with the receiver in Bankruptcy of the project requires HUD to sell the project to appellant. The leases stated that

> Should the Landlord announce in writing an intention to submit the***[project] to a plan of cooperative or condominium ownership,***[t]enant herein will be given first option to purchase the apartment at the price and upon terms set forth in any such plan.

Even viewing the clause as binding on HUD, it is not enforceable since HUD decided that the project should remain a rental property.

[2] Second, appellant argues that under the doctrine of equitable estoppel HUD is required to negotiate with the cooperative. Appellant's only plausible basis for this claim involves a meeting between representatives of appellant and Marilyn Melkonian, the then Deputy Assistant Secretary for Multifamily Housing Programs of HUD, who appellant alleges assured the cooperative that HUD would negotiate exclusively with it for the sale of the project. Ms. Melkonian submitted an affidavit which stated that she never made any such assurances. However, even if she made such a statement and even if the regulations[1] modifying the procedure for selling unsubsidized projects to tenant cooperatives are, as appellant claims, invalid, appellant still does not have a cause of action. The regulations which the contested regulations superseded restricted to the Property Disposition Committee the authority to transfer multifamily projects.[2] Therefore, since unauthorized actions by HUD officials do not bind the agency and since appellant is

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[1] 24 C.F.R. §§ 290.7, 290.53(c) (1981); 44 Fed. Reg. 56,609 (1979).
[2] 24 C.F.R. § 290.40 (1981).

deemed to have notice of the officials' limited authority, appellant offers no grounds for application of equitable estoppel.[3]

[3] Finally appellant claims that the amendment to 12 U.S.C. § 1701z-11(c)[4] contained in the Housing and Community Development Act of 1980[5] somehow affects the parameters of the Secretary's discretion in disposing of HUD projects. Nothing in the statute or the legislative history of the act[6] gives appellant grounds for that belief. The amendment does not change, in any way relevant here, HUD's discretion as to how to dispose of the project.

[4] Appellant has not demonstrated that there are material issues of fact to be litigated. "[W]hen a movant makes out a convincing showing that genuine issues of fact are lacking, we require * * * [in order to deny a motion for summary judgment] that the adversary adequately demonstrate by receivable facts that a real, not formal, controversy exists * * *."[7] (Footnote omitted.) We hold that there are no remaining genuine material issues of fact in this case and, therefore, the decision of the district court is

AFFIRMED.

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[3] See *Housing Corp. of America v. United States*, 199 Ct.Cl. 705, 711, 468 F.2d 922, 925 (1972).

[4] 12 U.S.C. § 1701z-11(c)(3) (Supp. IV 1980) reads, in part "(c) * * * the Secretary shall seek to * * * (3) maintain the project for purposes of providing rental or cooperative housing for the longest feasible period."

[5] Pub.L. No. 96-399, 94 Stat. 1614 (1980).

[6] H.R. Conf. Rep. No. 1420, 96th Cong., 2d Sess. 107, *reprinted in* [1980] U.S. Code Cong. & Ad. News 3506, 3617, 3652.

[7] *Bruce Constr. Corp. v. United States*, 242 F.2d 873, 875 (5th Cir. 1957).

United States District Court

MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 80-356 Civ-T-H

MANDALAY SHORES COOPERATIVE HOUSING ASSOCIATION, INC.,
Plaintiff,

-vs-

SAMUEL R. PIERCE, *et al.*,
Defendants.

MEMORANDUM OPINION

This is an action by a non-profit corporation, Mandalay Shores Cooperative Housing Association, Inc., formed by a number of tenants of Mandalay Shores Apartments, Clearwater, Florida. The apartment building is owned by the United States Department of Housing and Urban Development, and the Plaintiff seeks to compel HUD to negotiate with it and sell it the project.

The Defendants have answered the complaint and have moved, with supporting affidavits, for the entry of summary judgment. The Plaintiff has responded to the motion for summary judgment and has moved, with supporting affidavits, for the entry of a preliminary injunction prohibiting HUD from offering the property for sale by competitive bid.

A hearing was conducted in open court on March 17, 1981. The parties were represented by their counsel of record, and argument was entertained. Upon full consideration of those arguments, the affidavits and other papers in the file, including the legal memoranda of counsel, I have determined that the Plaintiff's motion for a preliminary injunction should be DENIED and that the Defendants' motion for summary judgment should be GRANTED.

Mandalay Shores Apartments was developed in 1963 with a loan insured by the Federal Housing Administration under Section 207 of the National Housing Act, as amended, 12 USC §1713. The building is located directly on the Gulf of Mexico in Clearwater Beach. Its 386 units are contained in a central 12 story section with a 10 story connecting wing on each side.

HUD originally acquired the property in April 1965 in settlement of the insurance claim following a default by the mortgagor. HUD then sold the property in 1970, taking back a purchase money mortgage. The purchaser and mortgagor also defaulted and HUD reacquired the property in 1977 pursuant to a deed delivered by the mortgagor in settlement of a foreclosure proceeding instituted by HUD.

In July of 1979 the HUD Area Office formulated a recommendation that the property be sold; and in August, 1979, the Plaintiff Mandalay Shores Cooperative Housing Association, Inc., offered to purchase the property and tendered to the Area Office a check for $100,000. The Area Office promptly returned the proposal and the check. The Plaintiff then resubmitted and later extended its offer to purchase, together with a letter of credit for $100,000. In November, 1979, the Area Office sent each of the individual tenants of Mandalay Shores a notice that HUD intended to sell the project, and it invited the submission of proposals and comments. This was followed by a meeting conducted by the HUD Area Manager with the tenants in December 1979.

Thereafter, on February 12, 1980, the Area Manager notified the Plaintiff by letter that "the purchase proposal submitted by your organization has been reviewed by the Department of Housing and Urban Development, and is rejected." The letter also stated, however, that "when a final recommendation for disposition is prepared, all tenants will have an opportunity to review the plan and to comment further."

This suit was then instituted by the Plaintiff on March 21, 1980. Subsequent to the filing of the suit, however, HUD continued with its administrative procedures leading up to a sale. Accordingly, on June 6, 1980, the Area Office provided

tenants of the property with notice of the recommendation it intended to submit to the Property Disposition Committee of HUD in Washington; and on June 27, 1980, that recommendation was forwarded to the Committee. The recommendation specifically considered the desire and earlier proposal of the Plaintiff to purchase the property, but recommended against that form of disposition due to the shortage of rental housing in the area, the fact that the project was not formerly subsidized, and the fact that only a few tenants were eligible for Section 8 rent assistance. (Affidavit of Alexander Pires, Paragraph 14).

On September 30, 1980, the HUD Property Disposition Committee approved a written decision and authorization for the sale of Mandalay Shores pursuant to competitive bidding procedures but subject to a number of conditions designed to assure the rehabilitation of the building and its continuation as a rental facility. The specific recommendation approved by the Committee included the following discussion:

> After carefully reviewing the Area Office's analysis and recommendation, the comments from the tenants and the Association, the Association's August 1980 proposal, Notice H80-83 on Condo/Coop conversions, and HUD regulations at 24 CFR 290, we do concur with the recommendation to provide for some type of action to prevent imminent displacement of these elderly tenants, but do not feel that there is sufficient justification for HUD to maintain this formerly unsubsidized project in inventory and undertake several million dollars worth of repairs without first attempting to competitively offer it to private entities which could make the repairs. As for the Association's attempts to purchase the project, this project is not formerly subsidized and therefore the only manner in which a negotiated sale could be accomplished, pursuant to the 290 regulations, would be through a waiver of the advertising requirements of the regulations. *In addition, because of the shortage of rental housing in the area, conversion of the project to other than rental use at this time is not advisable since it would remove units from the rental*

market, which would not be in accordance with current Departmental policy expressed in Notice H80-63. (Emphasis supplied)

II

The statutory provision from which HUD derives its authority to dispose of the property is embodied in 12 USC 1713(1):

> Notwithstanding any other provisions of law relating to the acquisition, handling, or disposal of real and other property by the United States, the Secretary shall also have power, for the protection of the interests of the General Insurance Fund, to pay out of the General Insurance Fund all expenses or charges in connection with, and to deal with, complete, reconstruct, rent, renovate, modernize, insure, make contracts for the management of, or establish, suitable agencies for the management of, *or sell for cash or credit or lease in his discretion, any property acquired by him under this section.* . . . (emphasis supplied)

The statutory provision upon which the Plaintiff relies is embodied in 12 USC § 1715z-11:

> In any case which the Secretary sells a multifamily housing project acquired as the result of a default on a mortgage which was insured under this chapter to a cooperative which will operate it on a nonprofit basis and restrict permanent occupancy of its dwellings to members, or to a nonprofit corporation which operates as a consumer cooperative as defined by the Secretary, the Secretary may accept a purchase money mortgage, or upon application of the mortgagee, insure a mortgage under this section upon such terms and conditions as the Secretary determines are reasonable and appropriate, in a principal amount equal to the value of the property at the time of purchase,

> which value shall be based upon a mortgage amount on which the debt service can be met from the income of property when operated on a nonprofit basis after payment of all operating expenses, taxes, and required reserves; except that the Secretary may add to the mortgage amount an amount not greater than the amount of prepaid expenses and costs involved in achieving cooperative ownership, or make such other provisions for payment of such expenses and costs as the Secretary deems reasonable and appropriate. Prior to such disposition of a project, funds may be expended by the Secretary for necessary repairs and improvements.

The Plaintiff does not and could not say that there is anything in the law which requires that the property be sold to it. Rather the Plaintiff contends that Section 1715z-11 vests discretion in the Secretary of HUD to negotiate a sale of Mandalay Shores Apartments to it, and that the Secretary has abused that discretion by adopting regulations which automatically foreclose negotiated sales of any multifamily housing project not formerly subsidized under the Act, i.e., the regulations do not provide for the negotiated sale of unsubsidized housing projects to non-governmental entities. See 24 CFR § 290.53(c).

The Defendant contends, and correctly so, that there is nothing in the statute which mandates a particular method of sale for HUD acquired projects; that Section 1715z-11 merely establishes a method for computing the amount of the loan which the Secretary may make or insure when he exercises his discretion to negotiate the sale of a project to a cooperative; and that his ultimate discretion to negotiate or not to negotiate for a sale to a cooperative is emphasized in the pertinent legislative history of the Act. See Conference Report on the Housing and Community Development Act of 1974, Report No. 93-1279, 93rd Cong., 2d Session, 153.

Although the challenged regulation (24 CFR § 290.53) does generally abandon one of the options the Secretary would have in disposing of projects like Mandalay Shores, it does not

follow that the regulation thereby abuses the discretion given to him by the statute. On the contrary, the regulation may be viewed merely as a means of exercising that discretion against negotiated sales of *un*subsidized housing to private parties for the purpose of acting "... for the protection of the interest of the General Insurance Fund." 12 USC § 1713(1). This is hardly an irrational distinction. Moreover, the regulation is not an absolute prohibition or bar against such sales; there is an expressed provision allowing a waiver. 24 CFR § 290.7.*

In any event, it is unnecessary to decide in this case whether the regulations foreclosing negotiated sales of all unsubsidized projects to non-governmental agencies constitutes an abrogation or abuse of the statutory discretion vested in the Secretary. This is true because the Property Disposition Committee did not reject the Plaintiff's offer of purchase solely on the basis of those regulations. Rather, it specifically considered the merits of the proposal in the context of evaluating whether the regulation should be waived (See 24 CFR § 290.7) and elected to reject the possibility of a negotiated sale to the Plaintiff on the additional grounds that such a sale would remove the apartment units from the rental market in an area already suffering from a shortage of rental housing, observing that such result would be contrary to established departmental policy.

The ultimate issue in the case is whether, pursuant to the Administrative Procedure Act, 5 USC §§ 701 and 706, the Secretary's exercise of discretion in this case was made in an arbitrary and capricious manner. See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 91 S.Ct. 814 (1971).

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* The Plaintiff also argues that Congress intended that the Secretary should exercise his discretion more frequently or more freely in favor of cooperative purchasers of unsubsidized housing, and that the congressional will is not being served. If that is true, the argument should more appropriately be addressed to Congress which might wish to consider a more explicit statutory directive. It might also be observed that even if the Congress did hope that the Secretary's discretion would favor cooperatives more often in such circumstances, it does not follow that the Secretary could or should be required to exercise his discretion in that manner concerning *this* project in favor of *this* Plaintiff.

Manifestly, the factors considered by the HUD Area Office and the Property Disposition Committee in deciding against a sale to the Plaintiff were proper considerations to be evaluated in deciding whether to negotiate with the Plaintiff or seek competitive bids; the basis of the decision was by no means arbitrary or capricious. Moreover, to the extent the Plaintiff attempts to assert a denial of due process, the record clearly shows full and studied consideration of the Plaintiff's interest and offer, as well as the positions and interests of the individual tenants who were given repeated opportunities to be heard. All of the *process that was due was given.*

Under these circumstances it follows that the Plaintiff's motion for a preliminary injunction should be DENIED; and, further, in the absence of any issue of *material* fact, that the Defendants' motion for summary judgment should be GRANTED. The Clerk is directed to enter judgment in favor of the Defendants and against the Plaintiff with costs to be assessed according to law.

IT IS SO ORDERED.

DONE and ORDERED at Tampa, Florida, this 2nd day of April, 1981.

/s/ Wm. Terrell Hodges

United States District Judge